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In The

Supreme Court of the United States

CITY OF LONG BEACH,

Petitioner,

v.

SEUNG CHUN LIM, FLUFFY, INC., a California corporation, and 5436 SANTA MONICA BOULEVARD, INC., a California corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE CALIFORNIA CITIES AND COUNTIES IN SUPPORT OF CITY OF LONG BEACH'S PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

I. SUMMARY OF REASONS WHY REVIEW SHOULD BE GRANTED 1

A. Interests Presented by *Amicus Curiae* 1

B. The Decision of the Ninth Circuit Substantially Conflicts with Existing Law Governing Adult Business Zoning Regulations 2

II. THE COURT SHOULD GRANT CERTIORARI ON THE QUESTION OF WHICH PARTY BEARS THE BURDEN OF PROOF IN DETERMINING WHETHER AN ADULT BUSINESS ZONING ORDINANCE PROVIDES "REASONABLE ALTERNATIVE AVENUES OF COMMUNICATION" 7

A. The Ninth Circuit Erred by Confusing the Burdens Imposed on a Defendant Under the Three Separate Elements of the *Renton* Test 8

B. The Decision Imposes an Unfair and Unnecessary Burden on Public Entities 11

III. THE COURT SHOULD REVIEW THE NINTH CIRCUIT'S HOLDING THAT PROPERTIES SUBJECT TO "LONG-TERM" LEASES MAY NOT BE CONSIDERED IN DETERMINING WHETHER ZONING REGULATIONS LEAVE A REASONABLE NUMBER OF SITES 12

A. A Rule Disqualifying Sites Subject to Long-Term Leases Is Inconsistent with The Principles Established in *Renton* 13

B. The Presence or Absence of a Long-Term Lease Is Not a Reliable Indicator of the Actual Potential Availability of a Site 16

TABLE OF CONTENTS – Continued

Page

C. A Requirement for Considering Long-Term Leases Imposes Immense Practical Burdens on Public Entities Which Are Not Constitutionally Justified 17

IV. CONCLUSION..... 20

TABLE OF AUTHORITIES

Page

CASES

Alexander v. City of Minneapolis, 928 F.2d 278 (8th Cir. 1991) 15

BBI Enterprises, Inc. v. City of Chicago, 874 F.Supp. 890 (N.D. Ill. 1995) 7

Ben Rich Trading, Inc. v. City of Vineland, 126 F.3d 155 (3rd Cir. 1997) 9

Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983) 10

Boss Capital, Inc. v. City of Casselberry, 187 F.3d 1251 (11th Cir. 1999), *cert. denied*, 120 S.Ct. 1423 (2000) 4, 14

Buzzetti v. City of New York, 140 F.3d 134 (2nd Cir. 1998), *cert. denied*, 525 U.S. 816 6

City of Erie v. Pap's A.M., 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) 9

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) ..... *passim*

David Vincent, Inc. v. Broward County, 200 F.3d 1325 (11th Cir. 2000) 8, 10, 15

Diamond v. City of Taft, 215 F.3d 1052 (9th Cir. 2000), *petition for cert. filed*, 69 USLW 3296 (Oct. 18, 2000) (No. 00-608) 4, 14

Grand Brittain v. City of Amarrillo, 27 F.3d 1068 (5th Cir. 1994) 15

Holmberg v. City of Ramsey, 12 F.3d 140 (8th Cir. 1993), *cert. denied*, 513 U.S. 810 (1994) 4, 15

TABLE OF AUTHORITIES – Continued

Page

J & B Entertainment v. City of Jackson, 152 F.3d 362 (5th Cir. 1998) 9, 11

Lim v. City of Long Beach, 12 F.Supp.2d 1050 (C.D. Cal. 1998) 6

Lim v. City of Long Beach, 217 F.3d 1050 (9th Cir. 2000), *petition for cert. filed* (Nov. 20, 2000) (No. 00-814) ..... *passim*

North Avenue Novelties, Inc. v. City of Chicago, 88 F.3d 441 (7th Cir. 1996), *cert. denied*, 519 U.S. 1056 (1997) 6, 14

Phillips v. Borough of Keyport, 107 F.3d 164 (3rd Cir. 1997), *cert. denied*, 522 U.S. 932 ..... 9, 11

T-Marc, Inc. v. Pinellas County, 804 F.Supp. 1500 (M.D. Fla. 1992) 8

Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994) 15, 16

United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) 9, 10

Woodall v. City of El Paso, 49 F.3d 1120 (5th Cir. 1995), *cert. denied*, 516 U.S. 988 ..... *passim*

Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) 2, 3

STATUTES

42 U.S.C. § 1988 3

BRIEF AMICUS CURIAE OF CALIFORNIA CITIES AND COUNTIES IN SUPPORT OF CITY OF LONG BEACH'S PETITION FOR WRIT OF CERTIORARI

This *amicus curiae* brief is presented on behalf of 95 California cities, towns and counties (collectively "California Cities").[1] A full listing of the California Cities is attached hereto at Appendix A. California Cities respectfully request that the Court grant the petition for certiorari seeking review of the Ninth Circuit's decision in *Lim v. City of Long Beach*, 217 F.3d 1050 (9th Cir. 2000), *petition for cert. filed* (Nov 20, 2000) (No. 00-814).

Pursuant to Rule 37.2(a) of the Rules of the Supreme Court, *amicus curiae* have obtained the consent of petitioner City of Long Beach and respondents Seung Chun Lim, *et al.*, to the filing of this amicus brief.

I. SUMMARY OF REASONS WHY REVIEW SHOULD BE GRANTED

A. Interests Presented by *Amicus Curiae*

Amicus curiae represent various cities, towns and counties ranging in size from large metropolitan areas to small residential communities throughout California. Many have had first hand experience with litigation initiated by the owners of sexually oriented ("adult") businesses. California Cities believe their interests and

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[1] Pursuant to Rule 37.6 of the Rules of the U.S. Supreme Court, this brief was authored solely by Fox & Sohagi and no person or entity other than *amicus curiae*, its members or its counsel provided a monetary contribution to the preparation or submission of this brief.

experiences in addressing the issues created by adult businesses are representative of those of municipal governments throughout the United States. Municipal governments have a strong interest in obtaining clear and consistent guidance from the courts on issues affecting the constitutionality of adult use ordinances. Municipal governments also have a strong interest in ensuring that standards by the Courts are not only clear, but capable of practical implementation by local governments seeking to balance the requirements of the First Amendment against the recognized adverse secondary effects of adult businesses.

B. The Decision of the Ninth Circuit Substantially Conflicts with Existing Law Governing Adult Business Zoning Regulations

This Honorable Court has twice addressed the subject of zoning ordinances which regulate the location of adult businesses, *i.e.* businesses which convey sexually explicit materials or forms of entertainment for a profit. In both instances, the Court recognized the "admittedly serious problems" created by adult businesses, and endorsed city efforts to protect residential and other sensitive uses from the adverse effects of such businesses, while still affording adult businesses a reasonable opportunity to operate. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (*"Renton"*); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71-72, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (*"Young"*). The Court also twice observed that public entities "must be allowed a reasonable opportunity to experiment with

solutions to admittedly serious problems." *Renton*, 475 U.S. 41, 52; *Young*, 427 U.S. at 71.

In *Renton*, the Court established the basic analytical framework governing First Amendment challenges to adult business zoning regulations. The basic analysis includes an examination as to whether:

1. The ordinance is "content neutral," *i.e.* directed at public objectives unrelated to the suppression of expression (475 U.S. 41, 47-49);

2. The ordinance is "designed to serve a substantial governmental interest," and reasonably narrowly tailored for that purpose (475 U.S. 41, 50-53); and

3. The ordinance allows for "reasonable alternative avenues of communication" (475 U.S. 41, 53-54).

Notwithstanding *Renton* and *Young*, regulation of adult businesses remains a prolific source of litigation. The numerous cases cited in this brief represent only a small portion of the appellate court, district court and state court decisions on the subject. Quite simply, adult businesses have immense financial incentives to contest the validity of adult business zoning regulations. Such suits are often boosted by the possibility of recovering substantial attorneys' fees under 42 U.S.C. § 1988. Cities in turn have strong incentives to vigorously defend the constitutionality of their regulations. They do so, however, at the expense of diverting considerable municipal resources from other needed programs. Public entities therefore have a critical need for clear, consistent and practical guidelines governing the adoption and constitutionality of adult business zoning regulations.

Adult business litigation abounds over the issue of whether a jurisdiction's regulations leave open "reasonable alternative avenues of communication," *i.e.*, a sufficient number of potential adult business sites. *Renton*, 475 U.S. 41, 53-54. The problem is by no means confined to major cities, but also affects smaller communities who can ill afford expensive litigation. *See, e.g, Holmberg v. City of Ramsey*, 12 F.3d 140 (8th Cir. 1993), *cert. denied*, 513 U.S. 810 (1994); *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999), *cert. denied*, 120 S.Ct. 1423 (2000) [population of 32,000]; *Diamond v. City of Taft*, 215 F.3d 1052 (9th Cir. 2000), *petition for cert. filed* 69 USLW 3296 (Oct. 18, 2000) (No. 00-608) [population of 6,800].

The Ninth Circuit's decision in *Lim v. City of Long Beach*, 217 F.3d 1050, makes it considerably more complicated and exceedingly more difficult to ensure constitutionally sound regulatory provisions that safeguard the community from the serious deleterious secondary effects of adult businesses while still allowing for their operation. First, the decision holds that public entities bear the burden of proof on the question of whether the ordinance leaves open "adequate alternative means of communication." *Id.* at 1054. Amici believe this conclusion is legally incorrect for reasons elaborated in Section II below. While a public entity bears a limited burden of identifying a permissible basis for their adult business regulations under the first two elements of the *Renton* test, no court has previously held that a public entity bears the burden of proof on the third, basically factual, question of whether the ordinance leaves open an adequate number of sites. The Fifth Circuit in *Woodall v. City of El Paso*, 49 F.3d 1120, 1126 (5th Cir. 1995), *cert. denied*, 516 U.S. 988

concluded the opposite. This new requirement by the Ninth Circuit imposes a considerable additional practical burden on public entities both inside and outside the courtroom. Public entities apparently now must not only be prepared to make the entire record necessary to litigate alternative sites issues, but must anticipate being required to prevail by a preponderance of the evidence on every contested issue concerning the availability of each site. Challengers to adult business regulations, however, may trigger this burden by little more than filing a pleading alleging the inadequacy of the sites.

The *Lim* decision further compounds the difficulties facing public entities by holding that sites zoned for adult business use, but which are subject to "long-term" leases, cannot be considered part of the relevant real estate market. *Lim*, 217 F.3d at 1056. This holding is logically inconsistent with *Renton's* command that adult businesses "fend for themselves in the real estate market," and cannot complain if available properties are occupied by other uses through no fault of the government. 475 U.S. 41, 53-54. The decision also ignores the commercial reality that leases, long-term or short-term, often may be assigned, sublet or terminated, and therefore do not necessarily represent a bright-line barrier to acquisition by an adult business or any other commercial user. The practical problem posed by this holding is tremendous. Neither cities or counties have a reliable or economically practical way of determining which properties may be disqualified by reason of a long-term lease, either at the time of enactment of an ordinance, or in ensuing years.

Finally, the *Lim* decision conflicts with an emerging consensus among the circuit courts that an adult use

business regulation will be upheld if it is shown that the number of sites available to adult businesses substantially exceeds the number of adult businesses reasonably likely to require accommodation. *See Lim*, 217 F.3d at 1055-1056; cf. *Buzzetti v. City of New York*, 140 F.3d 134, 141 (2nd Cir. 1998), *cert. denied*, 525 U.S. 816; *North Avenue Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 444-445 (7th Cir. 1996), *cert. denied*, 519 U.S. 1056 (1997); *Woodall*, 49 F.3d 1120, 1126-1127. In *Lim*, Long Beach provided a non-exhaustive list, with supporting evidence, showing the existence of 115 potential sites. After a full evidentiary trial, the district court found that 109 of these were actually potentially available to adult businesses, and that only six adult businesses existed in Long Beach. *Lim v. City of Long Beach*, 12 F.Supp.2d 1050, 1066-1067 (C.D. Cal. 1998). The Ninth Circuit nevertheless reversed and remanded to allow the plaintiff to offer evidence that some of the 109 sites were subject to long-term leases or other impediments. *Lim*, 217 F.3d at 1056.

Taken as a whole, *Lim* leaves public entities completely uncertain of how they should allocate sufficient sites for adult businesses without compromising the goal of minimizing the serious secondary effects of such businesses, unless they are willing to fund detailed site-by-site evaluations of at least each property made available to adult businesses each time they enact or amend an adult business zoning ordinance. This duty, moreover, would be ongoing. Public entities will need to frequently update their individual site data, perhaps annually, to ensure that changes in lease status or other market conditions did not render individual sites arguably unavailable. California Cities respectfully submit that the

Constitution does not impose such a burden on jurisdictions attempting to balance in good faith the First Amendment rights of adult businesses and the legitimate demands of their citizens for protection from the conceded adverse secondary effects of these businesses.

California Cities offer below a more detailed critique of the legal errors and problems created by the *Lim* decision, with emphasis on the first two issues presented for review.

II. THE COURT SHOULD GRANT CERTIORARI ON THE QUESTION OF WHICH PARTY BEARS THE BURDEN OF PROOF IN DETERMINING WHETHER AN ADULT BUSINESS ZONING ORDINANCE PROVIDES "REASONABLE ALTERNATIVE AVENUES OF COMMUNICATION"

The first issue presented for review is which party – the plaintiff adult business operator or defendant public entity – bears the burden of proof on the third element of the *Renton* test, *i.e.* whether an adult business zoning ordinance provides "reasonable alternative avenues of communication." *Renton*, 475 U.S. 41, 53-54. In *Lim*, the Ninth Circuit held that the defendant public entity bears the burden of proof on this issue. *Lim*, 217 F.3d at 1054.

This Ninth Circuit decision conflicts with authority in other circuits. *See Woodall*, 49 F.3d 1120, 1126; *BBI Enterprises, Inc. v. City of Chicago*, 874 F.Supp. 890, 895 (N.D. Ill. 1995). Other courts have held that a public entity has only

the "burden" of identifying the areas and number of sites legally available under the ordinance, *i.e.* information which may be deduced from zoning and parcel maps. *T-Marc, Inc. v. Pinellas County*, 804 F.Supp. 1500, 1504 (M.D. Fla. 1992). The burden of proving that such sites are not reasonably available in fact, or are constitutionally inadequate in number, however, rests on the plaintiff. *Id.*

California Cities believe that the Ninth Circuit's ruling is legally insupportable. At bottom, the Ninth Circuit's opinion appears to rest on a misreading of prior precedents in this Court and other circuits, and a failure to properly distinguish among the discrete elements of the constitutional test established in *Renton*. The Ninth Circuit erred in *Lim* by failing to distinguish between the *burden of proof* in a courtroom, and the *burden of justification* which a public entity may bear in showing that the challenged regulations are "content neutral" and "designed to serve a substantial governmental interest." *See Renton*, 475 U.S. 41, 47 and 48-53. No court has previously found that a public entity defendant bears any burden of proof or justification on the third element of the *Renton* test, which is essentially a factual question. *David Vincent, Inc. v. Broward County*, 200 F.3d 1325, 1333 (11th Cir. 2000).

A. The Ninth Circuit Erred by Confusing the Burdens Imposed on a Defendant Under the Three Separate Elements of the *Renton* Test

In *Renton*, 475 U.S. 41, this Court held that zoning regulations which restrict the permissible location of

adult businesses should be examined under the test generally applied to "time, place and manner" restrictions on speech. The essential elements of the constitutional test are whether the regulations are "content neutral," "designed to serve a substantial governmental interest," and "do not unreasonably limit alternative avenues of communication." *Renton*, 475 U.S. 41, 47.

This Court and lower courts have found that public agencies do bear a certain *burden of justification* with respect to specific elements of the foregoing tests, specifically the first and second elements of the test identified in *Renton*, or the corresponding components of the four part *O'Brien* test. *United States v. O'Brien*, 391 U.S. 367, 376-377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). To satisfy this "burden of justification," the government must make at least a minimal affirmative showing by (1) identifying a legitimate governmental purpose served by the challenged regulations unrelated to the suppression of speech, and (2) providing evidence that it "reasonably believed" the regulations would ameliorate the problem and were appropriately tailored to further the stated governmental purpose. *Renton*, 475 U.S. 41, 50-53; *Phillips v. Borough of Keyport*, 107 F.3d 164, 172-173 and 178-179 (3rd Cir. 1997), *cert. denied*, 522 U.S. 932; *Ben Rich Trading, Inc. v. City of Vineland*, 126 F.3d 155, 161-163 (3rd Cir. 1997); *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 1395-1396, 146 L.Ed.2d 265 (2000) [applying similar criteria under *O'Brien* test]; *J & B Entertainment v. City of Jackson*, 152 F.3d 362, 371-375 (5th Cir. 1998).

No decision before *Lim*, however, has purported to extend this justification requirement to the third prong of the *Renton* test. *Renton*, 475 U.S. at 53-54. This is borne out

in the very authority cited in *Lim*, 217 F.3d at 1054 – the cited passages in these other circuit court opinions all address the first two elements of the *Renton* test or corresponding elements of the *O'Brien* test.

Lim also cites *Renton*, 475 U.S. at 50, as "implicitly placing the burden of proof on city." *Lim*, 217 F.3d at 1054. The cited portion of *Renton*, however, addresses the question of whether the city ordinance served a substantial governmental interest. *Renton* offers no suggestion as to which party bears the burden of proof on the issue of reasonable alternative avenues of communication. 475 U.S. at 53-54. *Lim* lastly cites *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n. 20, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983). That case, however, involved postal regulations barring the unsolicited mailing of advertising for contraceptives, and did not involve any issue concerning the adequacy of alternative avenues of communication.

Aside from citation to inapt authority, the Ninth Circuit in *Lim* offers no particular justification for imposing the burden of proof on public entities where the question is the adequacy of the number or kind of sites left available for operation of adult businesses. California Cities believe there is no justification for such a holding. The question of whether an adequate number of sites are available for adult businesses is ultimately a factual one (*David Vincent*, 200 F.3d 1325, 1333), capable of being established by objective evidence. There is no special reason that the burden of proof should be shifted to the defendant on this question. The rule that governmental entities must make some threshold affirmative showing regarding the first two elements of the *Renton* test, is akin to a rule of necessity. As various courts have observed, in

the absence of such a threshold showing, the courts simply cannot evaluate whether the regulation was adopted for the impermissible purpose of restricting speech, nor can the court know what evidence the public entity "reasonably believed" to justify its conclusions that the challenged regulations were an appropriate means of addressing the problem. *Phillips*, 107 F.3d 164, 173-174; *J & B Entertainment*, 152 F.3d 362, 372-375.

B. The Decision Imposes an Unfair and Unnecessary Burden on Public Entities

The allocation of the burden of proof to defendants has tremendous practical implications. The first and most obvious of these implications is that, absent contrary direction from this Court, public entities may no longer rely on any presumption of constitutionality nor simply respond to specific allegations of deficiencies by the plaintiff. Public entities faced with litigation by adult business operators must instead prepare to prevail by a preponderance of the evidence on every contested issue concerning the availability of adequate "alternative means of communication."

There appears no good justification for transferring the burden of proof on this issue to public entities. The burden of proving legislative enactments unconstitutional is normally placed on a challenging party, and this requirement has not been found in other contexts to dilute the protections provided by the Constitution. While it has been said that government must afford some "breathing room" for the exercise of First Amendment

rights, breathing room afforded to adult businesses often comes at the expense of what this Court has recognized to be substantial adverse secondary effects on surrounding communities and neighboring citizens. *Renton,* 475 U.S. 41, 54. Moreover, the test of whether an entity's regulations afford adequate "alternative avenues of communication" comes only after the entity has established that its regulations are content neutral and narrowly tailored so as not to intentionally or unnecessarily suppress free expression. *Renton,* 475 U.S. 41, 47-53. The judicial policy which mandates heightened scrutiny of regulations affecting free expression is satisfied by these first two elements of the *Renton* test. Public entities can ill afford the additional burdens which would be imposed by the Ninth Circuit's holding that they bear the entire burden of proof in showing that their adult business zoning regulations leave available a satisfactory number of sites for adult businesses.

III. THE COURT SHOULD REVIEW THE NINTH CIRCUIT'S HOLDING THAT PROPERTIES SUBJECT TO "LONG-TERM" LEASES MAY NOT BE CONSIDERED IN DETERMINING WHETHER ZONING REGULATIONS LEAVE A REASONABLE NUMBER OF SITES

In the trial court proceedings, Long Beach identified a total of 115 specific sites available for adult businesses. *Lim,* 217 F.3d 1050, 1055. The Ninth Circuit nevertheless remanded to allow the plaintiff to offer evidence that some of these sites were encumbered by long term leases. The Ninth Circuit opined that such properties did not

have a "genuine possibility of coming available for commercial use," and therefore could not be deemed part of the "relevant commercial real estate market" for purposes of determining the number of available sites. *Id.* at 1055-1056. Implicitly this reasoning would also disqualify other sites encumbered by other long-term privately-created restrictions, such as restrictive covenants, over which the public entity has no control.

The rule adopted by the Ninth Circuit is problematic on several levels. First, it is inconsistent with principles stated in *Renton*, 475 U.S. 41, 53-54. Second, the rule lacks a genuine factual foundation. In the real commercial world, the existence of a long-term lease is not a reliable indicator of long-term availability or unavailability. Possession of leased property may be acquired by any number of means, including sublease, purchase, assignment, default, business failure or bankruptcy. Lastly, there is no practical, reasonable means for public entities to comply with the rule. In many cases it will be impossible to identify properties subject to long-term leases at the time of enactment of an adult use zoning regulation, and in all cases it would require an extraordinary and unwarranted investigative burden to identify all such relevant properties.

A. A Rule Disqualifying Sites Subject to Long-Term Leases Is Inconsistent with The Principles Established in *Renton*

This Court established the basic analytical framework for determining whether zoning regulations leave open "reasonable alternative avenues of communication"

in *Renton*, 475 U.S. 41, 53-54. The Court effectively dispensed with any notion that public entities are required to guarantee adult businesses the ability to operate. Rather, the obligation is merely to provide adult businesses a reasonable opportunity to compete with other commercial enterprises for space within it jurisdictional boundaries. The Court noted:

> "That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. . . . [W]e have never suggested the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. . . . "

Id. at 54.

In the years since the *Renton* decision, it has become clear that the question of whether a zoning ordinance provides a "reasonable opportunity" for adult businesses to open and operate turns on the number of individual *sites* lawfully available under the ordinance, after factoring in relevant restrictions. *Lim*, 217 F.3d 1050, 1054; *Boss Capital*, 187 F.3d 1251, 1253-1254; *Diamond v. City of Taft*, 215 F.3d 1052, 1057-1058; *North Avenue Novelties*, 88 F.3d 441, 445; *Woodall*, 49 F.3d 1120, 1125. As dictated by *Renton*, there is universal agreement that purely economic factors, such as the cost of moving, purchasing, leasing, improving or refurbishing a legally available site, are irrelevant in determining whether a site is "available" for

adult businesses. *David Vincent*, 200 F.3d 1325, 1334; *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1529 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994); *Holmberg*, 12 F.3d 140, 144; *Alexander v. City of Minneapolis*, 928 F.2d 278, 283 (8th Cir. 1991).

There is less clarity on what other factors may render a site unavailable. The two leading decisions which have emerged on the subject generally hold that the universe of sites deemed available for adult businesses must be defined in terms of the "relevant real estate market," which includes all sites which are potentially available for any normal commercial use. *Topanga Press*, 989 F.3d 1529-1530; *Woodall*, 47 F.3d 1120, 1124. However, whether a site within this market is "actually" available, as opposed to merely "potentially" available for other reasons is irrelevant for First Amendment purposes. *Topanga Press*, 47 F.3d at 1529, citing *Renton*, 475 U.S. 41, 53; *Woodall*, 49 F.3d at 1126. The fact that a site zoned for adult business use is already occupied by another business is irrelevant; this is simply an inevitable result of competition for space in the real estate market. *David Vincent*, 200 F.3d 1325, 1335; *Woodall*, 49 F.3d at 1125 [holding it irrelevant that a building site is "currently occupied or leased"]. It is also constitutionally irrelevant that the owners of existing sites may be reluctant to sell or lease to an adult business. *David Vincent*, 200 F.3d 1325, 1335; *Woodall*, 49 F.3d at 1125; *Alexander*, 928 F.2d 278, 283. The inquiry is simply whether *any* generic commercial business could be located on the site. *Topanga Press*, 989 F.2d at 1529-1532; *Woodall*, 47 F.3d 1120, 1124; *see Grand Brittain v. City of Amarrillo*, 27 F.3d 1068, 1069-1070 (5th

Cir. 1994). Only sites that cannot feasibly be used by any commercial enterprise are excluded. *Id.*

The foregoing core principles stated in *Topanga Press, Woodall* and subsequent cases are consistent with *Renton*. The problem presented here is the Ninth Circuit's attempt to hedge on these principles by disqualifying commercial sites subject to long-term leases. This is fundamentally inconsistent with *Renton's* requirement that adult businesses "must fend for themselves in the real estate market." *Renton*, 475 U.S. 41, 54. It is manifest that in any commercial real estate market, a substantial number of properties are likely to be under current lease obligations for varying terms. The fact that available sites are tied up by other uses is simply one of the market factors that adult businesses, like any other business, must address.

B. The Presence or Absence of a Long-Term Lease Is Not a Reliable Indicator of the Actual Potential Availability of a Site

Aside from being legally untenable, the long-term lease rule proffered in *Lim* rests on a fundamentally and demonstrably false factual premise, *i.e.* that a property subject to a long-term lease is necessarily unavailable for adult businesses. This premise ignores both the legal and factual reality of commercial leasing. An adult business operator may in fact acquire the right to operate on previously leased property through any number of mechanisms. First, the lease may be assignable. Alternately, the adult business may sublease all or a portion of the property. A lease may also provide for contingencies or options for early cancellation or abandonment which

would render the property available for rent or lease long before expiration of the full lease term. A lease may also be cancelled by mutual agreement of the lessor and lessee. Lastly, no lease guarantees the economic health of the leasing business. If the lessee becomes insolvent, declares bankruptcy or otherwise ceases operation, the lease is of little practical effect. The owner generally will be required to consent to an assignment, sublease or termination of lease in favor of new tenants.

Given the realities of commercial leasing, it is clear that no credence can be given to the premise that properties subject to long-term leases are necessarily unavailable for the short or long term. On a purely legal plane, there may be no constraint at all. The election to assign the lease, sublet or exercise other options provided by the lease may be purely an economic decision of the lessee or lessor. There is no sound basis for deeming leased properties excluded from the "relevant real estate market" by virtue of the current lease term.

C. A Requirement for Considering Long-Term Leases Imposes Immense Practical Burdens on Public Entities Which Are Not Constitutionally Justified

If allowed to stand, this aspect of the *Lim* decision will impose a substantial new burden on public entities to ascertain and monitor the lease status of all designated properties under its zoning ordinance. If a public entity fails to investigate and make allowance for the assumed unavailability of leased properties at the time it enacts an ordinance, its work may be subject to instant challenge,

with the prospect of awards of damages, attorneys' fees, other attendant costs and the inherent disruption of litigation. Moreover, the danger is not confined to the time of enactment, but continues throughout the duration of the ordinance, since the number of available sites may at any time be contracted by the leasing of additional properties, a market factor over which a public entity has no control.

To satisfy the standard established in *Lim*, public entities will need to engage in constant monitoring of real estate activity. As a practical matter, the burden is not only daunting, but likely impossible to satisfy. The granting of a long-term lease is a private market transaction and the parties are under no obligation to record the lease. The prospect of public entities combing public records or inquiring door-to-door to monitor leasing activity raises troubling questions regarding government intrusiveness and monitoring of private activity.

The foregoing problems are considerably aggravated if one takes into account the infinite variations in terms, durations and contingencies which may be found in individual leases. The *Lim* decision itself does not advise public entities of how "long-term" a lease must be to disqualify a property as a potential adult business site. Even assuming public entities may guess the correct standard, a public entity cannot fully evaluate how serious an impediment the lease is to actual potential adult business use without reviewing the terms of each lease individually. In the absence of some bright-line rule, public entities would be required to scrutinize and evaluate each lease individually, with regard to such terms as assignability, renewal, cancellation, and other contingencies.

Moreover, a final assessment of whether the lease truly renders the property unavailable for a full term cannot be made in the abstract, without some assessment of the economic viability of a lessee's business in the actual market place. Such assessments are not only impossible given the information likely to be available, but well beyond the expertise normally required of public decisionmakers.

It is no answer to say that such complex inquiries may be postponed until the time public entities' regulations are actually challenged in court. First, public entities should not be required to operate with such a sword of Damocles hanging over their heads. Uncertainty and unpredictability over the constitutionality of government regulations favors no one. Second, even assuming the burden is triggered only by the filing of the lawsuit, the burden is still too onerous. *Renton* and the body of case law following in its wake – did not contemplate that the constitutionality of adult zoning regulations would turn on debates among expert witnesses concerning the minutiae of individual lease terms affecting properties in the relevant commercial property market. The interests of all parties are best served by a bright-line rule which avoids microscopic examination of the leasehold status of every property zoned to be available for adult businesses. Such an inquiry is clearly inappropriate and unnecessary to determine whether adult businesses have been afforded an opportunity to compete on equal terms for space in the real estate market place. No more is constitutionally required. *Renton*, 475 U.S. 41, 53-54.

IV. CONCLUSION

California Cities recognize that reconciliation of the First Amendment and municipal zoning powers as they affect adult businesses requires a careful and well considered balancing of interests. The decision of the Ninth Circuit in *Lim*, 217 F.3d 1050, has decidedly upset the balance, imposing new and unwarranted burdens, and placing public entities throughout the country in greater uncertainty as to the law. Review should be granted by this Court to redress this error and clarify the law.

Respectfully submitted,

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